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TAXATION

OVERVIEW

There is an apparent trend within the Tenth Circuit Court of Appeals for safeguarding taxpayers' interests in tax litigation. The administrative and procedural cases analyzed in this article[1] have been selected to illustrate how the circuit has made the government account for its procedures in investigating and enforcing compliance with the federal tax laws. Further, the scope of this article demonstrates that an over-extension of the holdings in these cases could significantly limit the government's capability to successfully prosecute future violations of the federal tax laws.

In *United States v. Phillips*[2] and *United States v. Wells*,[3] the Tenth Circuit adopted a subjective standard for assessing a taxpayer's "good faith misunderstanding of law" defense for failure to file income tax returns in violation of I.R.C. section 7203.[4] Such a subjective standard could have wide-ranging ramifications on the government's efforts to effectively deal with future tax protestor problems.

Two cases were decided during the survey period which applied the "legitimate purpose" rule established in *United States v. Powell*[5] to assess the appropriateness of the government's initiation of civil tax investigations. In *United States v. Balanced Financial Management*,[6] the Tenth Circuit presented a thorough analysis of the proper standard by which the initiation and implementation of civil tax investigations are judged in the context of the *Powell* rule and subsequently enacted statutory and procedural provisions. In *United States v. Church of World Peace*,[7] the Tenth Circuit held that certain statutory and constitutional safeguards served to limit this "legitimate purpose" standard of *Powell* with respect to tax investigations of churches.

The Tenth Circuit, in *Cyclone Drilling, Inc. v. Kelley*,[8] developed its interpretation of the "reasonable diligence" standard to which the I.R.S.

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1. This survey article discusses tax cases that were decided by the Tenth Circuit Court of Appeals between June, 1985 and May, 1986. Each of these cases involve statutory provisions that are located in Subtitle F, Procedure and Administration, of the Internal Revenue Code.
2. 775 F.2d 262 (10th Cir. 1985); see *infra* notes 12-53 and accompanying text.
3. 790 F.2d 73 (10th Cir. 1986); see *infra* notes 27-53 and accompanying text.
4. I.R.C. § 7203 (Supp. III 1985) provides, in pertinent part:
Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor. . . .
5. 379 U.S. 48 (1964); see *infra* notes 54-91 and accompanying text.
6. 769 F.2d 1440 (10th Cir. 1985); see *infra* notes 54-70 and accompanying text.
7. 775 F.2d 265 (10th Cir. 1985); see *infra* notes 71-91 and accompanying text.
8. 769 F.2d 662 (10th Cir. 1985); see *infra* notes 92-105 and accompanying text.

would be held in satisfying the statutory notice requirements for a valid tax assessment under I.R.C. sections 6212[9] and 6213.[10] Finally, in *Voss v. Bergsgaard*,[11] the Tenth Circuit provided its interpretation of the standard for particularity in a search warrant issued in connection with a criminal tax investigation.

I. THE STANDARD FOR ASSESSING A GOOD FAITH MISUNDERSTANDING OF LAW DEFENSE

A. *Background*

Because tax laws are highly complex and because Congress did not intend to make criminals out of everyone who misunderstood them, courts have frequently permitted a "good faith misunderstanding of law" as a valid defense to negate the "willfulness" element in a prosecution for failure to file a tax return.[12] In *United States v. Murdock*,[13] the Supreme Court held that Congress did not intend that a person become a criminal by reason of a *bona fide misunderstanding* of his liability for the tax, of his duty to make a return, or of the adequacy of the records he maintained, should he fail to measure up to a prescribed standard of conduct.[14] The Supreme Court explained in *United States v. Bishop*[15] that wilfullness, in the context of tax litigation, is an "*intentional* violation of a known legal duty."[16]

Based on the judicial interpretation of the applicable tax statutes, courts have required that in order to prove willfulness in a tax case, the government must show that the defendant intended to break the law.[17] While this rule was intended to prevent defendants from being convicted as criminals in the context of a complex tax issue, it has resulted in an onerous burden on the government in tax protestor litigation.[18]

The question that has emerged in the prosecution of persons charged with willful failure to file income tax returns in violation of I.R.C. section 7203 is whether the proper standard for judging a mistake of law is a subjective or an objectively reasonable one. The Supreme

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9. I.R.C. § 6212(a)(1982) provides that the notice of deficiency must be sent by certified or registered mail to the taxpayer at his last known address.

10. I.R.C. § 6213(a)(1982) provides that any assessment imposed upon a taxpayer without a notice of deficiency having been sent is void and illegal.

11. 774 F.2d 402 (10th Cir. 1985); see *infra* notes 106-132 and accompanying text.

12. It has long been recognized that *ignorantia legis neminem excusat* or "ignorance of the law excuses no one." BLACK'S LAW DICTIONARY 673 (5th ed. 1979). However, in the context of tax litigation, courts have frequently been more permissive. *See* United States v. Murdock, 290 U.S. 389 (1933); *see also* United States v. Pomponio, 429 U.S. 10 (1976); United States v. Bishop, 412 U.S. 346 (1973).

13. 290 U.S. 389 (1933).

14. *Id.* at 396.

15. 412 U.S. 346 (1973).

16. *Id.* at 360 (emphasis added).

17. *See* cases cited *supra* note 12.

18. For a discussion of the problems inherent in the possible over-extension of the rule that a "good faith misunderstanding of law" should be a valid defense in tax prosecutions, *see infra* notes 37-53 and accompanying text.

Court's opinion in *Spies v. United States*[19] seems to imply some sort of "reasonableness" standard: "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the *exercise of reasonable care*."[20] This was not an expressly stated standard, however, and other circuits have reached inconsistent conclusions in applying a standard.[21]

B. *Subjective Standard Employed in Assessing Wilfullness in Criminal Tax Prosecutions Under I.R.C. Section 7203*: United States v. Phillips and United States v. Wells

1. *United States v. Phillips*

After trial to a jury, the defendant was convicted of willfully and knowingly failing to file income tax returns for three years in violation of I.R.C. section 7203. The jury rejected the defendant's argument that his failure to file was because he had sincerely and honestly believed that wages were not income. The defendant appealed the conviction on the ground that a jury instruction given at the trial[22] significantly limited his "good faith misunderstanding of law" defense. The jury instruction required an objectively reasonable belief rather than a subjective belief.

In reversing the conviction, the Tenth Circuit followed a First Circuit holding and applied a subjective standard.[23] The court chose to reject the Seventh Circuit decision in *United States v. Moore*,[24] that a mistake of law must be objectively reasonable to be a valid defense. After distinguishing *Moore* because the issue in that case involved the alleged unconstitutionality of the tax law, the Tenth Circuit held that ". . . to the extent *Moore* can be read as requiring that a good faith misunderstanding of the tax laws be objectively reasonable, we decline to follow it."[25] It should be noted that the Tenth Circuit distinguished between misunderstandings and disagreements and, in dicta, implied that good faith disagreements with the tax laws or good faith beliefs that the laws are

19. 317 U.S. 492 (1983).

20. *Id.* at 496 (emphasis added).

21. *Compare* United States v. Witvoet, 767 F.2d 338 (7th Cir. 1985); United States v. Barney, 674 F.2d 729 (8th Cir.), *cert. denied*, 457 U.S. 1139 (1982); United States v. Moore, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (objectively reasonable standard) *with* United States v. Aitken, 755 F.2d 188 (1st Cir. 1985); United States v. Burton, 737 F.2d 439 (5th Cir. 1984); United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970) (subjective standard).

22. The good faith instruction given at trial was:

> A mistake of law must be objectively reasonable to be a defense. If you find that the defendant did not have a reasonable ground for his belief, then regardless of the defendant's sincerity of belief, you may find that he did not have a good faith misunderstanding of the requirements of the law.

United States v. Phillips, 775 F.2d 262, 263 (10th Cir. 1985).

23. United States v. Aitken, 755 F.2d 188 (1st Cir. 1985). Defendant Phillips argued for the application of the purely subjective standard that was adopted by the First Circuit in *Aitken*, which was decided after Defendant Phillips was convicted, but before the filing of Phillips' appeal.

24. 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

25. *Phillips*, 775 F.2d at 264.

unconstitutional would not be valid defenses in any case.[26]

2. *United States v. Wells*

The *Wells* case involved substantially similar facts as those involved in *Phillips*.[27] The defendant in *Wells* was convicted by a jury of willfully and knowingly failing to file income tax returns for four years in violation of I.R.C. section 7203. The defendant unsuccessfully argued that his failure to file was the result of a mistaken interpretation of the tax laws. Following its earlier holding in *Phillips*, the Tenth Circuit reversed the conviction and remanded for a new trial based on its finding that the jury instruction was erroneous.

3. Analysis

a. *Split Among and Within Circuits*

By adopting the standard used by the First Circuit in *Aitken*, the Tenth Circuit may have created a stumbling block for successful prosecution of tax protestors. After *Phillips* and *Wells*, a defendant must only show that he honestly holds a subjective belief, regardless of how outrageous, to negate the willfulness requirement of section 7203. This purely subjective standard is contrary to previously established tax law which provided that certain subjective beliefs would never be permitted as valid defenses. These defenses include beliefs that the tax laws are unconstitutional[28] and personal disagreements with the tax laws.[29] Not only does the *Phillips* panel ignore the merits of the Seventh Circuit's *Moore* decision, but it also appears to deviate from the position previously taken by the Tenth Circuit in *United States v. Jensen*,[30] *United States v.*

26. *Id.*

27. The *Wells* case involved a "good faith misunderstanding of law" defense, similar to the *Phillips* case. However, unlike Defendant Phillips, Defendant Wells did not testify at his own trial to explain the nature of his beliefs, but rather chose to rely on the contents of his previous written replies to the I.R.S. correspondence to explain the nature of his beliefs. The beliefs listed in the letters submitted into evidence at Wells' trial included the belief that the defendant's wages were not "income," but rather were merely payments received in exchange for his time and labor that resulted in no taxable gain or loss, and the belief that the defendant was not a "taxpayer" as that word is used in the Internal Revenue Code.

28. United States v. Jones, 628 F.2d 402 (5th Cir. 1980), *cert. denied*, 450 U.S. 967 (1981); United States v. Weninger, 624 F.2d 163, 167 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980); United States v. Ware, 608 F.2d 400, 405 (10th Cir. 1979).

29. United States v. Burton, 737 F.2d 439, 442 (5th Cir. 1984); United States v. Karsky, 610 F.2d 548, 550 (8th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980). In addition to beliefs that the tax laws are unconstitutional and other disagreements, there are several exceptions which prevail in some jurisdictions which adhere to the subjective standard, including beliefs that the requirement of filing a tax return violates the taxpayer's fifth amendment rights (United States v. Jensen, No. 82-1648 (10th Cir. May 11, 1983)); that one is not a "person" as defined in the tax laws (United States v. Romero, 640 F.2d 1014 (9th Cir. 1981)); and that insufficient funds justifies failure to file (Yarborough v. United States, 230 F.2d 56 (4th Cir.), *cert. denied*, 351 U.S. 969 (1956)). None of these beliefs are recognized as valid good faith beliefs sufficient to constitute an affirmative defense to negate the "willfulness" that is required as a requisite to the crime.

30. No. 82-1648 (10th Cir. May 11, 1983).

Wainwright,[31] and *United States v. Ware*[32] which was to require some degree of reasonableness before a particular belief was accepted as a valid defense.

i. Appropriateness of Subjective Standard: *United States v. Aitken*

In the First Circuit case of *United States v. Aitken*,[33] the defendant was convicted in the district court for willfully failing to file tax returns in violation of I.R.C. section 7203, and for willfully filing false withholding exemption certificates in violation of I.R.C. section 7205.[34] The convictions were vacated on appeal and the case was remanded to the district court for further proceedings consistent with the First Circuit's ruling that "willfulness" in a criminal tax prosecution under I.R.C. sections 7203 and 7205 is measured by a subjective standard. In reaching its decision, the *Aitken* court relied upon several Supreme Court opinions which it interpreted as standing for the proposition that a subjective standard was the appropriate measure for assessing a good faith belief.[35] The inherent fallacy in this purely subjective standard is that it fails to recognize any objective constraints. Such a standard is contrary to pre-existing tax law which provides that certain subjective beliefs would never be valid defenses.[36]

ii. The Objectively Reasonable Standard: *United States v. Moore*

In *United States v. Moore*,[37] the defendant was convicted for willfully failing to file tax returns. The Seventh Circuit affirmed, rejecting the defendant's contention that the jury instructions did not adequately inform the jury of his "good faith" defense. The court concluded that when the district court gives a correct definition of "willfully" to the jury, no additional "good faith" defense instruction is required.[38] More significantly, the court stated that "the mistake must be objectively reasonable."[39]

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31. 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).
32. 608 F.2d 400 (10th Cir. 1979).
33. 755 F.2d 188 (1st Cir. 1985).
34. I.R.C. § 7205(a) (Supp. III 1985) provides in pertinent part:
Any individual required to supply information to his employer . . . who willfully supplies false or fraudulent information, or who willfully fails to supply information . . . shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.
35. *See* cases cited *supra* note 12.
36. *See supra* notes 28 and 29.
37. 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).
38. *Id.* at 833; *see also* United States v. Pomponio, 429 U.S. 10, 11 (1976) ("willful act" defined as "one done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose to disobey or to disregard the law"); United States v. Ware, 608 F.2d 400, 405 (10th Cir. 1979) ("willfully" means a "voluntary, intentional violation of a known legal duty"); Yarborough v. United States, 230 F.2d 56, 61 (4th Cir.) ("willful" defined as "voluntary, purposeful, deliberate and intentional"), *cert. denied*, 351 U.S. 969 (1956).
39. *Moore*, 627 F.2d at 833 (citing United States v. Barker, 546 F.2d 940, 948 (D.C. Cir. 1976)); *see also* United States v. Moore, 586 F.2d 1029, 1033 (4th Cir. 1978); Kratz v. Kratz, 477 F. Supp. 463, 480 (E.D. Pa. 1979).

In *Phillips*, the Tenth Circuit downplays the significance of the *Moore* opinion by incorrectly claiming that the objectively reasonable standard was discussed in dicta, and by claiming that the Seventh Circuit appeared to have vascillated between an objective and subjective standard.[40] This is not, however, an accurate depiction of the state of affairs in the Seventh Circuit. The "objectively reasonable" language in *Moore* was expressly reaffirmed by the Seventh Circuit in *United States v. Anton*[41] and in *United States v. Witvoet*.[42]

The Seventh Circuit's subsequent affirmations of its holding in *Moore* plainly indicate that the primary holding of the *Moore* decision is that an objectively reasonable standard is the appropriate measure to assess a good faith belief, and that such a holding is an "accurate expression of the law in the Seventh Circuit."[43] Thus, the Tenth Circuit's attempt in *Phillips* to minimize the significance of the *Moore* standard and to deny that there is a split among the circuits is disingenuous.

b. *Subjective Beliefs Which Are Never Considered to be Valid Defenses*

Although *Phillips* holds that a subjective standard is the appropriate measure to assess a good faith belief, there are some recognized exceptions which would not be valid defenses in any case. Defendants who honestly believe that the income tax laws are unconstitutional are not afforded a defense for their mistaken belief.[44] Similarly, a good faith disagreement with the tax laws is not a valid defense no matter how sincerely the disagreement is felt.[45] The Tenth Circuit has expressly recognized these exceptions to a subjective standard.[46] As stated in *Phillips*: "we decline to impose criminal liability on individuals who in good faith misunderstand the law. These individuals are, of course, to be distinguished from those who understand the obligations imposed upon them by the tax law but *disagree with that law or view it as unconstitutional*."[47] In light of these exceptions to a subjective standard, a purely subjective standard is an impossible measure to assess a "good faith misunderstanding of law" defense.

A possible resolution to this dilemma would be to recognize an additional exception. Some degree of reasonableness should be required of a belief before a "good faith misunderstanding of law" defense is permitted to negate a claim of willfulness. This proposed resolution is not a novel position. As suggested by the Tenth Circuit in *United States v.*

40. United States v. Phillips, 775 F.2d 262, 264 (10th Cir. 1985).
41. 683 F.2d 1011, 1018 (7th Cir. 1982).
42. 767 F.2d 338, 340 (7th Cir. 1985). *Witvoet* was decided after the First Circuit decision in *Aitken*.
43. *Id.*
44. *See supra* note 28.
45. *See supra* note 29.
46. United States v. Jensen, No. 82-1648 (10th Cir. May 11, 1983); United States v. Weninger, 624 F.2d 163 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1980); United States v. Ware, 608 F.2d 400 (10th Cir. 1979).
47. United States v. Phillips, 775 F.2d 262, 264 (10th Cir. 1985) (emphasis added).

Ware,[48] if a belief is so "devoid of reason and logic" that no one could possibly have believed it, then the "good faith" defense should not be permitted.[49]

Similarly, in *United States v. Jensen*,[50] the Tenth Circuit rejected as meritless the defendant's purported good faith assertion of his fifth amendment privilege against self-incrimination. The Tenth Circuit stated that to accept such a belief as a valid defense against a claim of willfulness would be to permit a "good faith" defense to anyone who had some notion of how the fifth amendment privilege worked, no matter how outlandish the notion.[51] In assessing the taxpayer's beliefs, the *Jensen* court refused to accept the taxpayer's outlandish interpretation of the fifth amendment as a valid "good faith" defense.[52]

Clearly, the court's adoption of a subjective standard in *Phillips* and *Wells* is out of step with prior Tenth Circuit decisions. The adoption of such a standard could lead to further inconsistencies within the Tenth Circuit as future cases are decided.[53]

4. Implications of Holdings

The imposition of a purely subjective standard to assess a "good faith misunderstanding of law" defense may further limit the government's capability to effectively control tax protestors' defiance of tax laws. Because there appears to be a split among the circuits and inconsistent holdings within the Tenth Circuit, guidance from the Supreme Court may be necessary. In the alternative, reconsideration by the Tenth Circuit, or at the very least, extreme care in the application of this liberal, subjective standard, seems appropriate.

II. THE STANDARD BY WHICH CIVIL TAX INVESTIGATIONS ARE INITIATED AND IMPLEMENTED

A. *Background*

In the landmark Supreme Court case of *United States v. Powell*,[54] it was established that to initiate a civil tax investigation, the investigation

48. 608 F.2d 400 (10th Cir. 1979).

49. *Id.* at 405-06. Furthermore, the court stated: "The defendant contends that his personal belief in what the law is, or should be, supersedes the federal Constitution and statutes as construed and applied by the Supreme Court. If each citizen is a law unto himself, government will exist in name only."

50. No. 82-1648 (10th Cir. May 11, 1983).

51. *Id.* at 5.

52. *Id.*

53. Both defendants in *Phillips* and *Wells* were re-convicted on remand by juries that were given revised jury instructions. However, the burden placed on the government by the imposition of a purely subjective standard to assess a "good faith misunderstanding of law" defense could likely deter future prosecution of tax protestors by the government. The fact that the jurors on the remand of *Phillips* and *Wells* were unconvinced that the respective defendants held a sincere and honest mistaken belief of law, cannot be understood to mean that future jurors who are presented with similar evidence will be likewise unconvinced. The government will have to be prepared to satisfy this heavy burden and therefore may become reluctant to prosecute tax protestors.

54. 379 U.S. 48 (1964).

must have a legitimate purpose, the inquiry must be relevant to the purpose, the information sought must not already be within the Commissioner's possession, and the administrative steps required by the Code must have been followed."[55] The Tenth Circuit presented a thorough analysis of the *Powell* "legitimate purpose" standard in *United States v. Balanced Financial Management*[56] in the context of subsequently enacted statutory and procedural provisions.[57]

The "legitimate purpose" standard, as restated in *Balanced Financial Management*, was subsequently limited with respect to civil tax investigations of churches in *United States v. Church of World Peace*.[58] The reasoning for this limitation stemmed from the Tenth Circuit's interpretation and application of certain statutory and constitutional safeguards.[59]

In *Cyclone Drilling, Inc. v. Kelley*,[60] the Tenth Circuit developed its interpretation of the "reasonable diligence" standard that governs the I.R.S. in satisfying the statutory notice requirements for a valid tax assessment.

B. Powell *Standard Upheld and Analyzed in Light of New Statutory and Procedural Provisions*: United States v. Balanced Financial Management

1. Case in Context

This case provides a useful overview of the standards by which the initiation and implementation of civil tax investigations by the government are judged. Although the government's investigation procedures were found to be proper, the review of the government's compliance with prescribed standards of conduct is indicative of the court's concern for taxpayers' interests.

2. Statement of Case

Balanced Financial Management ("BFM") was an Arizona corporation with a principal office in Salt Lake City, Utah, and several offices in Colorado. BFM promoted investments in property owned by Jarelco, a Texas corporation which owned master audio tape recordings of chil-

55. *Id.* at 57-58.

56. 769 F.2d 1440 (10th Cir. 1985). *See infra* notes 67-77 and accompanying text.

57. I.R.C. §§ 7401, 7402, and 7604 (1982) (these sections authorize the commencement of a civil action for recovery of taxes and grant jurisdiction to federal district courts to enforce I.R.S. summons); Rev. Proc. 83-78, 1983-2 C.B. 596. Rev. Proc. 83-78 has been modified and is effective as modified for returns, claims or applications filed after December 10, 1984. Rev. Proc. 84-84, 1984-1 C.B. 307. For an explanation of Rev. Proc. 83-78, see *infra* note 61.

58. 775 F.2d 265 (10th Cir. 1985).

59. These safeguards include I.R.C. § 7605(c) (1982) and first amendment freedom of religion and freedom of association rights. U.S. CONST. amend. I. Section 7605(c) has been changed substantially by I.R.C. § 7611 (Supp. III 1985). It should be noted, however, that the appeal in *Church of World Peace* arose under I.R.C. § 7605. For the language of § 7605(c), see *infra* note 79.

60. 769 F.2d 662 (10th Cir. 1985).

dren's music and related original artwork. Jarelco marketed leases of interests in the master recordings and represented to investors that they would be able to claim investment tax credit pass-throughs which were based on appraised values. The government subsequently alleged that the appraised values were grossly inflated. The I.R.S. issued an administrative summons to BFM directing its officers to appear to testify and to produce for examination specified records relating to the period extending from January 1, 1981 through January 6, 1984.[61] The records requested included BFM's books and financial records, essentially all of BFM's records relating to its business transactions with Jarelco and several other named persons, and all of its records relating to the promotion of tax shelters. BFM did not respond to the summons.

The government filed a petition in district court to enforce the summons. The court found that because the government's actions were not improper, BFM was required to comply with the summons. Subsequently, BFM filed a motion to enjoin further government investigation, which was denied by the court. The government filed a petition for an order to show cause why BFM should not be held in contempt for failing to comply with the summons. The court eventually dismissed the government's petition for failure to prosecute. Both sides appealed.

3. Discussion and Analysis of the Tenth Circuit's Opinion

a. *Enforcement of Administrative Summons and Denial of BFM's Request to Enjoin Further Government Investigation*

BFM appealed the district court's order enforcing an I.R.S. summons and denying BFM's request to enjoin further government investigation. The I.R.S. contended that it was conducting an investigation to determine whether BFM was liable for any internal revenue tax or penalties for promoting abusive tax shelters,[62] or had committed any offense under the internal revenue laws. BFM argued that the summons issued by the district court was issued for an illegitimate purpose, in violation of the *Powell* standard. BFM contended that this illegitimate purpose

61. The summons related to an examination being conducted pursuant to Rev. Proc. 83-78 which, in addition to the penalty and injunction provisions, could have resulted in the issuance of notices to BFM's clients and potential clients who were identified through the use of the summons.

Revenue Procedure 83-78 describes the program implemented by the Internal Revenue Service to identify and investigate abusive tax shelter promotions. The purpose of this revenue procedure was to discuss the procedures to be followed in identifying and investigating abusive tax shelters and to describe the options available to the Service once an abusive tax shelter has been identified and investigated. These options include a request for injunctive relief under section 7408 of the Internal Revenue Code, assertion of penalties under section 6700, and issuance of pre-filing notifications to investors.

62. Penalty provisions for promoting abusive tax shelters are found in I.R.C. § 6700 (1982). I.R.C. § 6700 was added to the Internal Revenue Code by the Tax Equity and Fiscal Responsibility Act of 1982, and was subsequently amended by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified as amended at 26 U.S.C. § 6700 (1984)). The provision provided for penalties against persons who promote abusive tax shelters, and granted the I.R.S. the authority to obtain an injunction against such promotors to enjoin them from further promotion.

was evidenced by the fact that the I.R.S. was conducting simultaneous, multi-district, duplicate examinations which amounted to harassment of BFM, and that the I.R.S. was making unauthorized disclosures to the public concerning the existence and status of tax examinations against BFM for the purpose of ruining its business in Colorado.[63]

The Tenth Circuit determined that the standard set forth in *Powell* applied to the statutes and that the government had satisfied this standard by establishing in its affidavit that the investigation had been conducted pursuant to a "legitimate purpose."[64] The Tenth Circuit affirmed both the district court's denial of BFM's request for an injunction and its issuance of the order enforcing the summons. This decision was based on the Tenth Circuit's finding that BFM had failed to meet its burden of refuting the government's prima facie showing for enforcement of the summons.[65] Furthermore, the court rejected BFM's contention that Revenue Procedure 83-78 was being administered in a harassing manner, holding that the Procedure does not require centralization of an investigation of a tax shelter promotion which operates in several districts.[66]

b. *Denial of Motion for Limited Discovery Privileges*

BFM sought limited discovery privileges and an evidentiary hearing to determine whether the I.R.S. had an illegitimate purpose behind the summons. Relying on prior Tenth Circuit decisions,[67] the court held that discovery is available in summons enforcement proceedings only in extraordinary situations. Since BFM failed to make a substantial preliminary showing that the I.R.S. did not issue the summons in good faith, BFM's discovery motion was denied.

c. *Requirement for John Doe Summons, Pursuant to I.R.C. Section 7609(f), Not Applicable*

I.R.C. section 7609(f) includes a "John Doe" provision which requires judicial approval before the I.R.S. can serve a summons seeking information from unnamed taxpayers.[68] The Tenth Circuit held that the I.R.S. need not comply with these requirements when it serves a

63. *BFM*, 769 F.2d at 1445.
64. *Id.* at 1443.
65. *Id.* at 1444.
66. *Id.* at 1446.
67. United States v. Security Bank and Trust Co., 661 F.2d 847 (10th Cir. 1981); United States v. Southern Tanks, Inc., 619 F.2d 54 (10th Cir. 1980) (per curiam).
68. I.R.C. § 7609(f) (1982) provides:
Additional requirement in the case of a John Doe summons. Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—
(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
(3) the information sought to be obtained from the examination of the records

summons on a known taxpayer for the dual purpose of investigating both the tax liability of that taxpayer and the tax liabilities of unnamed parties, as long as all of the information sought is relevant to a legitimate investigation of the summoned taxpayer.[69]

d. *Allegation of I.R.S Waiver of Right to Compel Compliance With Summons Rejected*

BFM contended that the I.R.S. waived its right to compel compliance with the summons when a revenue agent "agreed" that BFM would not be required to comply with the summons until it had received a written response to its letter to the Regional Commissioner requesting centralization of the I.R.S. investigation. In his declaration under penalty of perjury, the revenue agent stated that he had never agreed to "suspend, waive, or postpone [BFM's] appearance pursuant to the summons in issue," but merely stated that he "understood [BFM's] position."[70]

Since the question of an "agreement" between BFM and the I.R.S. was not before the court on appeal, the Tenth Circuit did not address the question of whether there was an "agreement" and whether such "agreement" would have constituted a waiver. However, the court held that even assuming the I.R.S. had agreed to change the original compliance date, it had effectively responded to BFM's request by letter advising BFM that a sufficient basis existed for each district to proceed with its respective investigation. The court thus rejected BFM's contention that the I.R.S. had waived its right to compel compliance with the summons.

4. Implications of Holding

This decision represents a thorough restatement of the current standards to which the I.R.S. is held in initiating and implementing civil tax investigations. These standards are premised on the long-established judicial precedent set forth in *Powell* and applied in the context of subsequently enacted statutory and procedural provisions. Although the court resolved the issues in favor of the government in this case, its thorough review of the government's compliance with such standards is indicative of an apparent trend by the circuit to require strict adherence by the government to a high standard of care in conducting tax investigations.

(and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

69. *BFM*, 769 F.2d at 1448-49 (citing Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310 (1985)).

70. *Id.* at 1449 n.9.

C. *Limitations of the* Powell *Standard for Investigations of Churches Under I.R.C. Section 7605(c) and its Successor, Section 7611*: United States v. Church of World Peace

1. Case in Context

Although the standard of care applied in the initiation and implementation of general tax investigations had been clearly established in *Powell*, the question before the Tenth Circuit in *United States v. Church of World Peace*[71] was whether an administrative summons issued by the I.R.S. should be examined under a more restrictive standard when the investigation involves a church.

Statutory provisions such as I.R.C. section 7605(c)[72] reflect a congressionally-determined balance between the government's legitimate interest in tax records and the rights of church organizations under the first amendment. The issue addressed by the *Church of World Peace* court, however, was whether the *Powell* "legitimate purpose" standard was applicable or whether some measure of necessity was imposed by section 7605(c).[73] While the Tenth Circuit had not previously addressed the issue, courts which have addressed it are not in agreement.[74] After careful consideration and analysis, the Tenth Circuit required the government to exercise greater care in the case of church investigations. The government was required to satisfy the "extent necessary" language of section 7605(c).[75] Since this was not accomplished, the district court's

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71. 775 F.2d 265 (10th Cir. 1985).

72. Subsection (c) of Section 7605 of the Internal Revenue Code was added by Section 121(f) of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 548 (1969) (codified at 26 U.S.C. § 7605(c) (1969)). Section 7605(c), the section under which the appeal in this case arose, provides:

> Restriction on examination of churches.
>
> No examination of the books of account of a church or convention or association of churches shall be made to determine whether such organization may be engaged in the carrying on of an unrelated trade or business or may be otherwise engaged in activities which may be subject to tax under part III of subchapter F of chapter 1 of this title (section 511 and following, relating to taxation of business income of exempt organizations) unless the Secretary or his delegate (such officer being no lower than a principal internal revenue officer for an internal revenue region) believes that such organization may be so engaged and so notifies the organization in advance of the examination. No examination of the religious activities of such an organization shall be made *except to the extent necessary* to determine whether such organization is a church or a convention or association of churches, and no examination of the books of account of such an organization shall be made other than to the extent necessary to determine the amount of tax imposed by this title. (emphasis added).

73. *Church of World Peace*, 775 F.2d at 267.

74. *See generally* United States v. Coates, 692 F.2d 629 (9th Cir. 1982) (statute permits examinations necessary to determine tax liability under any I.R.C. provision); United States v. Dykema, 666 F.2d 1096 (7th Cir. 1981), (District court's application of a "truly necessary" standard in error) *cert. denied*, 456 U.S. 983 (1982); United States v. Life Science Church, 636 F.2d 221 (8th Cir. 1980), *aff'd after remand sub nom.* United States v. Norcutt, 680 F.2d 54 (8th Cir. 1982) (I.R.S. summons overly broad); United States v. Holmes, 614 F.2d 985 (5th Cir. 1980) (summons of impermissible scope); United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979) (refusing to restrict I.R.S. inquiry).

75. United States v. Church of World Peace, 775 F.2d 265, 268 (10th Cir. 1985).

order enforcing the I.R.S. administrative summons was set aside.[76]

The Tenth Circuit's ruling that the purpose of section 7605(c) was to place limits on the examination of churches or inquiries by the I.R.S. is consistent with the trend to safeguard the taxpayer's interests and to hold the government accountable to a high standard of care in its investigative efforts. The concern raised by such a decision is whether this holding might limit the government's ability to control the tax abuse of fraudulent religious groups.

2. Statement of Case

Church of World Peace involved a district court order enforcing an administrative summons issued by the I.R.S. The summons requested certain books and records[77] of the Church of World Peace as well as the testimony of its pastor, Reverend William Conklin.

After determining that the summoned data might be relevant to determine the tax exempt status of the church and its possible tax liability, the district court issued an order enforcing the summons. This holding was based on the view that the public interest in making such determinations outweighed the church's privacy interests.[78]

The church appealed on the ground that the district court erred in holding that the summons was enforceable because it satisfied the *Powell* standard.[79] The church contended that I.R.C. section 7605(c) placed limitations on the *Powell* standard for investigation of churches, maintaining that the enforcement order should be reversed due to the government's failure to meet this higher statutory standard.[80] Further, the church argued that the district court erred in its determination that the summons was not overbroad.[81]

The government responded that an examination of books and records for the purpose of reviewing whether a church qualifies for tax exempt status does not result in "excessive entanglement" or violate rights of freedom of religion and association.[82] Further, the government argued that it had satisfied the "extent necessary," "notice," and "belief" requirements provided in the relevant Treasury Regulations[83]

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76. *Id.*

77. According to the district court's record, the summons requested, among other items, all books, records, and papers of the Church of World Peace and all records relating to any and all assets owned or used by the Church of World Peace and the manner in which such assets were acquired. Records regarding the nature and specific extent of all religious activities conducted by the Church were also requested. Record on Appeal, United States v. Church of World Peace, 775 F.2d 265 (10th Cir. 1985)(No. 84-2200).

78. United States v. Church of World Peace, No. 84-X-236, slip op. at 2 (D. Colo. Aug. 30, 1984).

79. Brief for Appellant at 5, United States v. Church of World Peace, 775 F.2d 265 (10th Cir. 1985)(84-2200).

80. *Id.* at 10-11.

81. *Id.* at 12-13.

82. United States v. Coates, 692 F.2d 629, 633 (9th Cir. 1982); *see also* Christian Echoes National Ministry Inc. v. United States, 470 F.2d 849, 856-57 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

83. 26 C.F.R. § 301.7605-1(c)(2) (1985) provides:

by sending a letter from the Regional Commissioner to the church, stating that it was necessary to examine its books and records.[84] The final argument raised by the government was that section 7605 placed no restrictions on the examination of churches because the government's duty to determine the proper taxes due overrides any statutory restrictions.[85]

The Tenth Circuit set aside the enforcement order, finding that I.R.C. section 7605(c) and first amendment safeguards prevented the application of the *Powell* standard in examinations of churches. The government, according to the Tenth Circuit, failed to meet this higher standard.[86] Citing *In re First National Bank, Englewood, Colorado*,[87] the court found that the church's affidavits were sufficient to shift the burden of proof to the government to justify its request to identify the members of the church, and that the government failed to meet its burden. The court also rejected the government's claim that section 7605 placed no restrictions on the examination of churches because such a proposition would nullify the effect of the statute and render it without a purpose.[88]

The court relied on the Eighth Circuit decision in *United States v. Life Science Church*,[89] and the Fifth Circuit ruling in *United States v. Holmes*[90] in reaching its conclusion that the all-inclusive language in the summons was overly broad under section 7605(c). In support of its conclusion, the court quoted the Fifth Circuit decision in *Holmes*:

Restriction on examination of churches—

Books of account. No examination of the books of account of an organization which claims to be a church or a convention or association of churches shall be made except after the giving of notice as provided in this subparagraph and except to the extent necessary (i) to determine the initial or continuing qualification of the organizations under section 501(c)(3); (ii) to determine whether the organization qualifies as one, contributions to which are deductible under sections 170, 545, 556, 642, 2055, 2106, or 2522; (iii) to obtain information for the purpose of ascertaining or verifying payments made by the organization to another person in determining the tax liability of the recipient, such as payments of salaries, wages, or other forms of compensation; or (iv) to determine the amount of tax, if any, imposed by the Code upon such organization. No examination of the books of account of a church or convention or association of churches shall be made *unless the Regional Commissioner believes that such examination is necessary and so notifies the organization* in writing at least 30 days in advance of examination. The Regional Commissioner will conclude that such examination is necessary only after reasonable attempts have been made to obtain information from the books of account by written request and the Regional Commissioner has determined that the information cannot be fully or satisfactorily obtained in that manner. In any examination of a church or convention or association of churches for the purpose of determining unrelated business income tax liability pursuant to such notice, no examination of the books of account of the organization shall be made except to the extent necessary to determine such liability. (emphasis added).

84. Record on Appeal at 12-13, United States v. Church of World Peace, 775 F.2d 265 (10th Cir. 1985)(No. 84-2200).

85. *Church of World Peace*, 775 F.2d at 268 (citing United States v. Coates, 692 F.2d 629 (9th Cir. 1982) and United States v. Dykema, 666 F.2d 1096 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982)).

86. *Id.*

87. 701 F.2d 115 (10th Cir. 1983).

88. *Church of World Peace*, 775 F.2d at 268.

89. 636 F.2d 221 (8th Cir. 1980).

90. 614 F.2d 985 (5th Cir. 1980).

> The second prong of the Powell test was pruned back by Congress in 1969, in regard to examination of churches, when it added subsection (c) to 26 U.S.C. § 7605. That provision limits the inquiry into the religious activities and books of account of churches "to the extent necessary" to ensure that the organization is a church and to determine the amount of tax owing. The "extent necessary" syntax is certainly more restrictive than the "may be relevant" language in the second tier of *Powell*.[91]

3. Implications of Holding

The *Church of World Peace* decision is consistent with the Tenth Circuit's attempt to require the government to strictly adhere to a high standard of care in conducting tax investigations, especially those involving first amendment considerations. However, limiting examinations of churches in this fashion could possibly hamper the government's ability to control the tax abuse of fraudulent religious groups.

D. *Notice Requirements for Valid Tax Assessments Pursuant to I.R.C. Sections 6212 and 6213*: Cyclone Drilling, Inc. v. Kelley

1. Case in Context

I.R.C. section 6213[92] provides that any tax assessment imposed upon a taxpayer without proper notice is void and illegal. I.R.C. section 6212[93] provides that a Notice of Deficiency must be sent by certified or registered mail to the taxpayer at his "last known address." Generally, the I.R.S. is required to use "reasonable diligence" in attempting to determine the taxpayer's correct address.[94] The issue addressed by the Tenth Circuit in *Cyclone Drilling* was the extent to which the taxpayer could explore the "reasonable diligence" that the I.R.S. exercised in ascertaining the taxpayer's "last known address."

2. Statement of Case

The taxpayer sought an injunction barring the I.R.S. from collecting an assessment of tax deficiencies for the 1979 and 1980 tax years which the taxpayer claimed were void due to improper notice. The issue

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91. *Id.* at 988 (footnote omitted).

92. *See supra* note 10.

93. *See supra* note 9.

94. Cool Fuel Inc. v. Connett, 685 F.2d 309, 313 (9th Cir. 1982) (duty of I.R.S. to exercise reasonable diligence not complied with where it was put on notice that taxpayer had moved when notice of deficiency was returned as undeliverable); Mall v. Kelly, 564 F. Supp. 371, 373 (D. Wyo. 1983) (reasonable diligence in locating taxpayer is satisfied by following published I.R.S. procedures on obtaining taxpayer's last known address); Tangren v. Mihlbachler, 522 F. Supp. 701, 703 (D. Colo. 1981) (I.R.S. failed to exercise reasonable diligence in determining taxpayer's new address before it attempted to seize taxpayer's property to satisfy alleged tax deficiency); Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974), *aff'd mem.*, 538 F.2d 334 (9th Cir. 1976) (reasonable diligence in determining taxpayer's correct address satisfied when Commissioner used the address appearing on taxpayer's return as the last known in the absence of clear and concise notification from the taxpayer directing the Commissioner to use a different address).

before the district court was whether the I.R.S. had sent the Notice of Deficiency to the taxpayer's "last known address." The court found that there was no material issue of fact and that the I.R.S. had properly sent the notice. Accordingly, the district court granted the government's motion for summary judgment and denied the taxpayer's requests for discovery and for an injunction to enjoin the I.R.S. from collecting the tax. The issue on appeal was whether the district court erred in its determination that no issue of material fact existed.

Since the taxpayer used its new post office box address on its Application for Additional Time to File Corporation Income Tax Return and on its actual 1980 return, and because the I.R.S. had used the taxpayer's new post office box address approximately fifteen times in correspondence concerning unrelated employment tax matters, the Tenth Circuit held that an issue of material fact remained as to what was the I.R.S.' actual knowledge of the taxpayer's "last known address."[95] Further, the court held that by denying the taxpayer's discovery requests, the taxpayer was unable to review the government's compliance with the "reasonable diligence" standard and its own internal procedures.[96] The court concluded that the taxpayer did not have a full and fair opportunity to explore whether the I.R.S. had, in fact, exercised "reasonable diligence" in determining the taxpayer's "last known address".[97] Accordingly, the case was reversed and remanded for a complete consideration of all pertinent facts and reasonable inferences.

3. Analysis

An analysis of this decision begins with the definition of "last known address." In the absence of a statutory definition, courts have interpreted it to mean "that address to which the I.R.S. reasonably believes the taxpayer wishes the notice sent."[98] Generally, when a taxpayer changes his address, he is required to give the I.R.S. notice of the change.[99] In deciding what constitutes adequate notice, the Tenth Circuit adopted the Ninth Circuit's interpretation,[100] holding that the filing of a tax return for a year subsequent to the year at issue and bearing a new address is "clear and concise" notice to the I.R.S.[101] Accordingly, the address on the taxpayer's most recent return will ordinarily be the taxpayer's "last known address."[102]

95. Cyclone Drilling, Inc. v. Kelley, 769 F.2d 662, 665 (10th Cir. 1985).
96. *Id.*
97. *Id.* at 665 (citing Cool Fuel Inc. v. Connett, 685 F.2d. 309, 312 (9th Cir. 1982)).
98. *Id.* at 664 (citing United States v. Ahrens, 530 F.2d 781, 785 (8th Cir. 1976) and Sorrentino v. Ross, 425 F.2d 213, 215 (5th Cir. 1970) and Delman v. Commissioner of Internal Revenue, 384 F.2d 929, 932 (3rd Cir. 1967), *cert. denied*, 390 U.S. 952 (1968)).
99. Weinroth v. Commissioner, 74 T.C. 430, 435 (1980).
100. United States v. Zolla, 724 F.2d 808, 810 (9th Cir.), *cert. denied*, 169 U.S. 830 (1984); Cool Fuel v. Connett, 685 F.2d 309, 312 (9th Cir. 1982); McPartlin v. Commissioner, 653 F.2d 1185, 1190 (7th Cir. 1981) (citing Ninth Circuit cases).
101. Cyclone Drilling, Inc. v. Kelley, 769 F.2d 662, 664 (10th Cir. 1985).
102. *See* DeWelles v. United States, 378 F.2d 37 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); Cohen v. United States, 297 F.2d 760 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962).

The relevant inquiry focuses on the government's knowledge, rather than on the taxpayer's actual current address.[103] In addition, the I.R.S. is required to use "reasonable diligence" in attempting to determine the taxpayer's correct address.[104]

4. Implications of Holding

The Tenth Circuit's ruling that the taxpayer is entitled to know more about how its own case was handled is indicative of the court's concern for the taxpayer's interests. It could be expected that the "complete consideration" on remand of the case would include a review of the methods used by the I.R.S. in ascertaining the taxpayer's "last known address" and a review of any pertinent I.R.S. procedural manuals.[105] Accordingly, the I.R.S. will have the burden of proof to show compliance with its own internal procedures.

The court's decision to hold the I.R.S. strictly accountable to a "reasonable diligence" standard, the shift in the burden of proof, and the increased public scrutiny to which the I.R.S. is being subjected are additional examples of an apparent trend within the Tenth Circuit to protect the taxpayers' interests at the risk of limiting the government's abilities to enforce compliance with the internal revenue laws.

III. The Standard for Particularity in Search Warrants Issued in Connection with Criminal Tax Investigations

A. *Background*

The fourth amendment provides that persons have a right to be protected from unreasonable searches and seizures by the government.[106] Generally, this right has been construed to prevent the issuance of general search warrants by imposing certain requirements on their issuance. For a search warrant to issue, there must be a showing supported by a written affidavit of probable cause to believe that a crime has been committed, that the items sought are evidence of such crime, and that such evidence will be at the place sought to be searched.[107] The fourth amendment's particularity requirement provides that the affidavit must describe in detail the items sought so that "nothing is left to the discretion of the officer executing the warrant."[108] The particularity requirement may cause significant problems in the case of tax investiga-

103. *Cyclone Drilling*, 769 F.2d at 664 (citing Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974), *aff'd mem.*, 538 F.2d 334 (9th Cir. 1976)).

104. *Id.*

105. *Id.*

106. U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

107. Zurcher v. Stanford Daily, 436 U.S. 547, 558-59 (1978).

108. Stanford v. Texas, 379 U.S. 476, 485 (1965) (quoting Marron v. United States, 275 U.S. 192, 196 (1927)).

tions involving the seizure of business records and documents because the items sought must be specifically described.

The particularity requirement is generally less stringent when applied to the search of business enterprises that are considered to be pervasive schemes to defraud or are inherently criminal.[109] Cases in support of this notion hold that if an entire business enterprise is permeated with criminal activity and the government sufficiently supports its probable cause determination, a warrant seeking *all* business records is not overbroad.[110]

B. *Limitations Placed on Scope of Search Warrant Issued for Premises of an Enterprise Alleged by the I.R.S. to be a Pervasive Tax Fraud Scheme*: Voss v. Bergsgaard

1. Case in Context

Voss v. Bergsgaard[111] involved a review of the particularity requirement as it relates to a criminal tax investigation of an enterprise that allegedly promotes fraudulent tax shelters in violation of I.R.C. section 6700.[112] According to the Tenth Circuit, the sufficiency of the government's showing that the taxpayer's activities are inherently criminal and the protection of certain first amendment freedoms are factors which affect the particularity requirement. The court also addressed whether the warrant was at least partially in compliance with the particularity standard, which would justify severance and acceptance of the valid portion.

The Tenth Circuit's affirmation of the district court's decision both to invalidate the search warrant because it did not meet the particularity standard and to grant the taxpayer's motion for the return of all property seized is an example of the circuit's imposition of a high standard of care on the government. The decision to uphold the taxpayer's interests over the government's need for the information in connection with its criminal tax investigation is consistent with an apparent trend by the circuit to safeguard taxpayers' interests.

2. Statement of Case

This case reviewed the validity of search warrants issued upon application by I.R.S. agents. Each application for a search warrant was supported by an affidavit which outlined an extensive investigation of an

109. Andresen v. Maryland, 427 U.S. 463 (1976) (seizure of business records from office for evidence of fraudulent real estate scheme); *see also* United States v. Offices Known as 50 State Distributing Co., 708 F.2d 1371 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984) (seizure of records justified where affidavit showed pervasively fraudulent operation encompassing entire business); United States v. Brien, 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980) (seizure of business records justified by a finding of probable cause that defendant was committing mail and wire fraud).

110. *See supra* note 109.

111. 774 F.2d 402 (10th Cir. 1985).

112. *See supra* note 62.

alleged tax protestor group and contained a detailed description of the items to be seized.[113] After the warrants were executed, the taxpayer filed a Rule 41(e) motion[114] seeking the return of all documents and other evidence seized. The taxpayer alleged that the warrants were not supported by sufficient probable cause and that they failed to describe with sufficient particularity the property to be seized. The district court ruled that although the affidavits set forth sufficient probable cause, they were nevertheless invalid on particularity grounds.[115]

The government appealed on the grounds that the district court erred in finding that the search warrants did not meet the particularity requirement and in granting the taxpayer's motion for the return of the seized property. The government's alternative argument was that it should have been allowed to retain the evidence seized under those provisions of the warrant which were sufficiently particular.

The Tenth Circuit affirmed the district court's finding that the warrants were invalid on particularity grounds and that they amounted to illegal writs of assistance since they gave the government "carte blanche . . . to take anything that they saw, whether it was nailed down or otherwise."[116] The court also rejected the government's request for severance of the warrant and retention of the evidence seized under sufficiently particular provisions. The basis for this ruling was that most of the warrant's provisions were overbroad and largely subsumed those provisions that would have been adequate standing alone.[117]

3. Discussion and Analysis of the Tenth Circuit's Opinion

a. *Fourth Amendment Considerations*

The Tenth Circuit rejected the government's contention that the search warrants did not amount to general warrants given the criminal nature of the taxpayer's activities. The court held that the government failed to show that the taxpayer's activities amounted to a pervasive scheme to defraud, which could have supported the seizure of all business records. The court did not agree with the government's reliance on *Andreson v. Maryland*[118] as standing for the proposition that white

113. The items to be seized included substantially all of the taxpayer's business records. *Voss*, 774 F.2d at 406 n.1.

114. FED. R. CRIM. P. 41(e) provides as follows:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district for trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

115. *Voss*, 774 F.2d at 403.

116. *Id.* at 404 (quoting Record at 68, *Voss* (Nos. 85-447M, 85-448M, 85-450M)).

117. *Id.* at 406.

118. 427 U.S. 463, 480-81 n.10 (1976).

collar criminals should not find refuge behind the particularity requirements simply because the extent and the complexity of their activities make impossible a more precise definition of the evidence sought. Accordingly, the court rejected the government's claim that under the circumstances the description of the items to be seized was as specific as could be expected.

b. *First Amendment Considerations*

The Tenth Circuit did not accept the government's contention that first amendment free speech and free association considerations do not impose a higher standard of "scrupulous exactitude"[119] when items seized have evidentiary value independent of any protected speech they might contain or associations they might identify.[120] The court did not find any merit to the argument that first amendment rights are not infringed, and the "scrupulous exactitude" test of *Stanford v. Texas*[121] does not apply when the basis for the seizure of written material is not for the ideas they contain.[122] The court also rejected the argument that the government's interest in securing compliance with its internal revenue laws overrides any incidental infringement of first amendment association rights.[123]

The Tenth Circuit also discounted the argument that the public should not be permitted to shield criminal conduct from government investigation via first amendment freedom of association protection.[124] The court rejected the government's contention that the first amendment safeguards that the Tenth Circuit sought to uphold in its 1983 decision of *In re First National Bank of Englewood, Colorado*[125] would not be eliminated when, as in this case, the government has made an abundant showing of probable cause to believe that members of an organization are engaged in criminal activity.

The circuit's reliance on the "scrupulous exactitude" test of *Stanford* should be viewed in light of a Supreme Court case[126] decided after *Voss*. In *New York v. P.J. Video, Inc.*,[127] the Court held that "an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of

119. Stanford v. Texas, 379 U.S. 476, 485 (1965); *see also* Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978).

120. United States v. Truglio, 731 F.2d 1123, 1127-28 (4th Cir.), *cert. denied*, 469 U.S. 862 (1984).

121. 379 U.S. 476 (1965).

122. *Truglio*, 731 F.2d at 1127-28. *See also* United States v. Rubio, 727 F.2d 786 (9th Cir. 1983); United States v. Apker, 705 F.2d 293 (8th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

123. *See* Wayte v. United States, 470 U.S. 598, 611 (1985); United States v. O'Brien, 391 U.S 367, 377 (1968).

124. *See* United States v. Rubio, 727 F.2d 786 (9th Cir. 1983) (items which are normally protected by the first amendment can be the proper subject of a search when those items will prove the taxpayer's association with criminal activity).

125. 701 F.2d 115 (10th Cir. 1983).

126. New York v. P.J. Video, Inc., 106 S.Ct. 1610 (1986).

127. *Id.*

probable cause used to review warrant applications generally."[128] Accordingly, the circuit's rejection of the argument that first amendment considerations do not impose a higher standard on the government should be reevaluated.

c. *Request for Severance of Warrant*

The circuit denied the government's request that the warrant be severed and that the government be allowed to retain the items seized under the provisions of the warrant which were sufficiently particular. This ruling was based on the court's finding that the warrant's overbreadth largely subsumed those provisions of the warrant which could have been adequate standing alone.[129] The court rejected the government's reliance on the principles stated in *United States v. Fitzgerald*[130] and *United States v. Apker*[131] that absent a showing of bad faith, the invalidity of part of a search warrant does not require the suppression of all evidence seized during its execution.

d. *Concurring Opinion*

Although Judge Logan concurred with the majority decision, he did not accept the majority's disapproval of the government's reliance on *United States v. Brien*[132] and *United States v. Offices Known as 50 State Distributing Company*[133] to support an all-records search. His concurring opinion was apparently premised on the fact that the government had difficulty identifying the exact statute which the taxpayer had violated, thus causing the warrant to be overbroad. Judge Logan concluded by stating that "[t]he government has neither demonstrated that virtually all of the NCBA's activities are illegal nor pinpointed the statutes that the business allegedly has violated. The purpose of an 'all records' search cannot be to find out what crime a person or entity might have committed."[134]

4. Implications of Holding

The precedential weight of this holding within the circuit will make it likely that search warrants issued in connection with future tax investigations will be judged under the stricter standard outlined herein. This holding could have an adverse effect on the government's capability to investigate possible violations of federal tax laws in the future due to such a strict particularity requirement to obtain a search warrant.

128. *Id.* at 1615.
129. Voss v. Bergsgaard, 774 F.2d 402, 406 (10th Cir. 1985).
130. 724 F.2d 633 (8th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 950 (1984).
131. 705 F.2d 293 (8th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).
132. 617 F.2d 299 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980).
133. 708 F.2d 1371 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984).
134. Voss v. Bergsgaard, 774 F.2d 402, 409 (10th Cir. 1985) (Logan, J., concurring).

CONCLUSION

During the survey period, consideration for taxpayers' interests was apparent in a number of decisions rendered by the Tenth Circuit. In *Phillips* and *Wells*, the court adopted a subjective standard for assessing a taxpayer's "good faith misunderstanding of law" defense. In *Church of World Peace*, the court relied on certain statutory and constitutional safeguards as authority to limit a tax investigation of a church. In *Cyclone Drilling, Inc.*, the court held the government to a high standard of care in satisfying the notice requirements for a valid tax assessment. In *Voss*, the government was likewise held to a high standard of care in satisfying the particularity requirement for a valid search warrant in connection with a criminal tax investigation.

If the holdings in these decisions were to be further extended, there could be a detrimental effect on the government's capability to successfully investigate and prosecute future violations of the federal tax laws. Such a result, although an apparently unintended consequence of the circuit's holdings, is a possibility nonetheless. Accordingly, care should be taken when applying these holdings as judicial precedent.

Vincent J. Oliva